

United States  
Circuit Court of Appeals

For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.

JESSIE SMITH, Administratrix of the Estate of  
JAMES W. WHITEHEAD, Deceased,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the Western District of Washington,  
Northern Division.

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FILED

JUL 28 1931

PAUL P. O'BRIEN,  
CLERK



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Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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COUNSEL OF RECORD:

For Plaintiff and Appellee:

GRAHAM K. BETTS, # 1402 Smith Tower,  
Seattle, Wash.

W. G. BEARDSLEE, #511 Alaska Bldg.,  
Seattle, Washington.

WRIGHT & WRIGHT, #400 Burke Bldg.,  
Seattle, Washington.

For Defendant and Appellant:

ANTHONY SAVAGE, United States District  
Attorney, #310 Federal Building, Seattle,  
Washington.

CAMERON SHERWOOD, Assistant United  
States District Attorney, #310 Federal  
Building, Seattle, Washington. [1\*]

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United States District Court, Western District of  
Washington, Northern Division.

No. 20072

JESSIE SMITH, Administratrix of the Estate of  
JAMES W. WHITEHEAD, Deceased,  
Plaintiff,

vs.

UNITED STATES OF AMERICA,  
Defendant.

AMENDED COMPLAINT.

Comes now the plaintiff and complains and alleges:

I.

That the plaintiff is the duly qualified and acting  
administratrix of the estate of James W. White-

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\*Page number appearing at the foot of page of original certified  
Transcript of Record.

head, Deceased, having been appointed as administratrix of said estate in Seattle, King County, Washington; that the plaintiff is now a resident of Seattle, Washington; that the plaintiff is the mother of the deceased, and at the time of his death, and prior thereto, was wholly dependent on him for support.

## II.

That James W. Whitehead enlisted for Military Service with the United States Army in the month of July, 1918, and was honorably discharged therefrom on the 20th day of November, 1918.

## III.

That immediately upon enlisting, desiring to be insured against the risks of war, the said James W. Whitehead applied for a policy of War Risk Insurance in the sum of \$10,000.00 designating no authorized person as beneficiary on said policy; [1] that thereafter, there was deducted from his monthly pay as premium for said insurance, the sum of \$6.60 per month, and a policy of insurance was duly issued to him, by the terms whereof, the defendant agreed to pay said James W. Whitehead, the sum of \$57.50 per month in the event he suffered total and permanent disability, or in the event of his death to make 240 such payments to his estate.

## IV.

That during the course of said military service, said James W. Whitehead contracted Pulmonary Tuberculosis and Paresis as a result whereof he was



discharged as hereinbefore stated, on the 20th day of November, 1918 totally and permanently disabled from continuously following any substantially gainful occupation, by reason whereof, there became due and owing the sum of \$57.50 per month, to the deceased on said date.

V.

That as an approximate result of said disability, said James W. Whitehead, died on the 30th day of September, 1921 by reason whereof his estate became entitled to receive from the defendant, the sum of \$57.50 per month from said date.

For a further cause of action, the plaintiff alleges:

I.

All facts and matters pleaded in Paragraphs One, Two and Three of the first cause of action, which paragraphs are by this plaintiff made a part hereof.

II.

That after the death of the insured and during the month of January, 1922, the defendant by and through its agents, the Medical Board of Review and Board of Appeals of the United States Veteran's Bureau did *made* a compensation rating in favor of the deceased from a date prior to the lapse of his policy to wit: from the date of his discharge, which rating was sufficient to pay premiums on his policy to and including the date of his recognized [2] total and permanent disability to wit: July 27th, 1921, which compensation was due and uncollected

on said date and was thereafter paid to the plaintiff, as administratrix of his estate.

### III.

That in addition to the rating referred to in Paragraph Six, the deceased was entitled to compensation for his disabilities tuberculosis and paresis, but the defendant, through its agent, the Director of U. S. Veteran's Bureau did willfully and arbitrarily refuse to make an award for such disability.

### IV.

That by reason of the foregoing, the said policy of insurance herein sued upon did not lapse, but was revived and kept in full force and effect until the date of recognized total and permanent disability to wit: July 27th, 1921, and thereafter and until the date of his death, to wit: September 30th, 1921, by reason of and under the terms of Section 305 World War Veteran's Act as amended.

That the plaintiff made proof of all the foregoing to the defendant, and demanded payment of the aforesaid amount, but that the defendant disagreed with the plaintiff as to her claims, and has refused to pay the same, or any part thereof, other than the sum of \$168.48 which was paid to the plaintiff on or about the 19th day of May, 1922.

WHEREFORE, plaintiff prays judgment against the defendant for the accrued monthly installments of \$57.50 per month commencing on the 20th day of November, 1918, or in lieu of thereof for the

accruing monthly installments commencing on the 27th day of July, 1921.

GRAHAM K. BETTS,  
WRIGHT & WRIGHT,  
Attorneys for Plaintiff. [3]

State of Washington,  
County of King.—ss.

Jessie Smith being first duly sworn upon her oath deposes and says, that she is the plaintiff in the foregoing action, that she has read the within and foregoing Amended Complaint, knows the contents thereof, and the same is true as she verily believes.

JESSIE SMITH.

Subscribed and sworn to before me this 12th day of December, 1930.

[Seal] GRAHAM K. BETTS,  
Notary Public in and for the State of Washington,  
residing at Seattle.

Received a copy of the within Amended Complaint this 13 day of Dec., 1930.

ANTHONY SAVAGE,  
Attorney for Defendant.

[Endorsed]: Filed Dec. 13, 1931. [4]

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(Title of Court and Cause.)

ANSWER TO AMENDED COMPLAINT.

Comes now the defendant in the above entitled action by Anthony Savage, United States Attorney

for the Western District of Washington, Tom DeWolfe, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney of the United States Veterans Bureau, and for answer to the amended complaint of the plaintiff herein, admits, denies and alleges as follows:

FOR ANSWER TO THE FIRST CAUSE OF ACTION PLEADED IN PLAINTIFF'S AMENDED COMPLAINT, DEFENDANT ADMITS, DENIES AND ALLEGES AS FOLLOWS:

I.

For answer to Paragraph I of the first cause of action of plaintiff's amended complaint, defendant alleges that it has not sufficient information or knowledge upon which to form a belief as to the truth or falsity of the allegations therein contained, and therefore denies the same.

II.

For answer to Paragraph II of the first cause of action of plaintiff's amended complaint, defendant admits the same.

III.

For answer to Paragraph III of the first cause of [5] action of plaintiff's amended complaint, defendant admits that on July 30, 1918 James William Whitehead applied for war risk insurance in the amount of \$10,000 payable in monthly installments of \$57.50 each, in the event of his death or permanent and total disability while the contract of in-

surance was in force and effect, and admits that the premiums were paid thereon through November 1918, but denies each, every and singular the remaining allegations therein contained.

IV.

For answer to Paragraph IV of the first cause of action of plaintiff's amended complaint, defendant denies each, every and singular the allegations therein contained.

V.

For answer to Paragraph V of the first cause of action of plaintiff's amended complaint, defendant denies each, every and singular the allegations therein contained.

FOR ANSWER TO THE SECOND CAUSE OF ACTION PLEADED IN PLAINTIFF'S AMENDED COMPLAINT, DEFENDANT ADMITS, DENIES AND ALLEGES AS FOLLOWS:

I.

For answer to Paragraph I of the second cause of action of plaintiff's amended complaint, defendant denies each, every and singular the allegations therein contained except wherein the same are specifically admitted by the defendant in its answer herein to the plaintiff's first cause of action as alleged in its amended complaint.

II.

For answer to Paragraph II of the second cause of action of plaintiff's amended complaint, defen-

dant denies each, every and singular the allegations therein contained. [6]

### III.

For answer to Paragraph III of the second cause of action of plaintiff's amended complaint, defendant denies each, every and singular the allegations therein contained.

### IV.

For answer to Paragraph IV of the second cause of action of plaintiff's amended complaint, defendant denies each, every and singular the allegations therein contained.

WHEREFORE, having fully answered both causes of action alleged by the plaintiff in its amended complaint herein, defendant prays that the same may be dismissed with prejudice and that it may go hence with its costs and disbursements to be taxed herein according to law.

ANTHONY SAVAGE,

United States Attorney.

TOM DeWOLFE,

Asst. United States Attorney.

LESTER E. POPE,

Regional Attorney,

United States Veterans Bureau.

United States of America,  
Western District of Washington.—ss.  
Northern Division.

Tom De Wolfe, being first duly sworn on oath deposes and says:

That he is an Assistant United States Attorney for the Western District of Washington, and as such makes this affidavit on behalf of the United States of America; that he has read the foregoing Answer to Amended Complaint, knows the contents thereof and believes the same to be true.

TOM DeWOLFE

Subscribed and sworn to before me this 16th day of December, 1930.

[Court Seal]

T. W. EGGER,  
Deputy Clerk, U. S. District Court  
Western District of Washington. [7]

Received a copy of the within Amended Answer this 10th day of Dec., 1930.

GRAHAM K. BETTS,  
WRIGHT & WRIGHT,  
Attorneys for Plff.

[Endorsed]: Filed Dec. 13, 1930 [8]

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(Title of Court and Cause.)

PETITION FOR JOINDER OF ADDITIONAL  
PARTY DEFENDANT.

Comes now the United States of America, defendant herein, by Anthony Savage, United States At-

torney for the Western District of Washington, and Tom DeWolfe, Assistant United States Attorney for said District, and shows to the Court as follows:

### I.

That in the policy of War Risk Insurance mentioned in plaintiff's complaint, plaintiff procured his wife Lilly Gladys Whitehead to be designated as a beneficiary of the assured.

### II.

That said Lilly Gladys Whitehead received a decree of divorce from said James W. Whitehead, the assured mentioned in said complaint, on the 1st day of August, 1921.

### III.

That said Lilly Gladys Whitehead was within the permitted class of beneficiaries specified by Section 300, World War Veterans Act at the time of her designation as beneficiary in the policy mentioned in the complaint herein. That she was also designated beneficiary in said policy at the time of the alleged maturity of the insurance mentioned in the complaint herein, which alleged maturity as stated in the complaint, took place on the 30th day of September, 1921.

### IV.

That Section 300, World War Veterans Act provides as follows:

“Where a beneficiary at the time of designation by the insured is within the permitted class of beneficiaries and is the designated beneficiary at the time



of the maturity of the insurance because of the death of the insured, such beneficiary shall be deemed to be within the permitted class even though the status of such beneficiary shall have been changed." [9]

V.

That the joinder of Lilly Gladys Whitehead as party defendant in this action is necessary to a complete and proper termination of this action.

WHEREFORE, your petitioners pray that an order be entered herein requiring plaintiff herein to join as an additional party defendant in this action Lilly Gladys Whitehead.

ANTHONY SAVAGE,  
United States Attorney.

TOM DeWOLFE,  
Assistant United States Attorney.

United States of America,  
Western District of Washington—ss.  
Northern Division.

Tom DeWofe, being first duly sworn, on oath deposes and says: That he is Assistant United States Attorney for the Western District of Washington, and as such makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing Petition for Joinder of Additional Party Defendant, knows the contents thereof, and believes the same to be true.

TOM DeWOLFE.

Subscribed and sworn to before me this 12 day of July, 1929.

[Seal]

T. W. EGGER,  
Deputy Clerk, United States District Court, Western  
District of Washington.

Received a copy of the within Petition this 12th day of July, 1929.

W. G. BEARDSLEE,  
WRIGHT & WRIGHT,  
Attorneys for Plaintiff.

[Endorsed]: Filed July 13, 1929. [10]

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(Title of Court and Cause.)

HEARING.

(Order Granting Petition for Joinder of Additional Party Defendant.)

Now on this 22nd day of July, 1929, G. K. Betts, Esq., appearing as counsel for the plaintiff and Tom DeWolfe, Assistant United States Attorney, appearing for the defendant, this matter comes on for hearing on petition for joinder of additional party defendant, which is argued by counsel and the same is granted.

Journal No. 17 at Page 210. [11]

(Title of Court and Cause.)

MOTION

Comes now the plaintiff above named and moves the Court for an order directing publication of Summons in the above entitled matter against Lilly Gladys Whitehead. This motion is based upon the affidavit hereto attached.

GRAHAM K. BETTS,  
W. G. BEARDSLEE,  
WRIGHT & WRIGHT,  
Attorneys for Plaintiff. [12]

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(Title of Court and Cause.)

AFFIDAVIT.

State of Washington,  
County of King,—ss.

Graham K. Betts, being first duly sworn, on oath deposes and says: That he is one of the Attorneys of record for the plaintiff above named; that said cause is being prosecuted by the said plaintiff as administratrix of the estate of James W. Whitehead, deceased, to enforce payment of a policy of war risk insurance; that upon motion of the defendant, one Lilly Gladys Whitehead, who was designated as beneficiary in the said policy, was ordered to be joined as party defendant in the said cause by order of this Court; that the said Lilly Gladys Whitehead has not been located to effect service of Summons

and Complaint upon her, and that her whereabouts are unknown; that the Summons and Complaint were filed with the United States Marshall for the purpose of effecting service thereof; that the said United States Marshall has filed his return of "not found, and it will therefore be necessary to effect service of said Summons by publication.

GRAHAM K. BETTS,

Subscribed and sworn to before me this 15 day of April, 1930.

[Seal]                      RUSSELL H. FLUENT,  
Notary Public in and for the State of Washing-  
ton, residing at Seattle.

[Endorsed]: Filed Apr. 16, 1930. [13]

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(Title of Court and Cause.)

This matter having come on for hearing on motion of the plaintiff above named by and through her attorney, Graham K. Betts, said motion having been supported by an affidavit of said attorney, from which it appearing to the Court that Lilly Gladys Whitehead was by order of this Court made a party defendant herein, and it appearing further that service of the summons and Complaint upon said Lilly Gladys Whitehead has not been effected by reason of the inability to locate the said Lilly Gladys Whitehead, and the United States Marshall having made and filed his return of "not found", and that it is therefore necessary and proper that service of

said Summons be effected by publication, now, therefore,

IT IS ORDERED that the defendant Lilly Gladys Whitehead be served in the above matter by publication of the Summons in the Daily Journal of Commerce, a newspaper of general circulation in King County, Washington, for six successive weeks, requiring the said defendant to appear and defend said action within sixty (60) days after the date of the first publication under penalty of default.

JEREMIAH NETERER,

Judge.

O. K.

TOM DeWOLFE,

Asst. U. S. Atty.

[Endorsed]: Filed April 16, 1930. [14]

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### PUBLISHER'S AFFIDAVIT

State of Washington,  
County of King,—ss.

Before me, the undersigned, a Notary Public, this day personally came M. F. Brown, who, being first duly sworn, according to law, says that he is the Business Manager of Daily Journal of Commerce, a daily newspaper published at Seattle, in said county and State, and that the publication, of which the annexed is a true copy, was published in said paper on the 24th day of May, 1930, and once each

week thereafter for five consecutive weeks and that the rate charged therefor is not in excess of the commercial rates charged private individuals, with the usual discounts.

M. F. BROWN,

Subscribed and sworn to before me this 28th day of June, 1930.

[Seal]

ED. M. BRITZ,

Notary Public in and for the State of Washington, residing at Seattle. [15]

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In the District Court of the United States for the Western District of Washington, Northern Division.  
Jessie Smith, Administratrix of the Estate of James W. Whitehead, deceased, Plaintiff, vs. United States of America, and Lilly Gladys Whitehead, Defendants. No. 20072. Summons by Publication.

United States of America to the said Lilly Gladys Whitehead, defendant:

You are hereby summoned to appear within sixty (60) days after the date of the first publication of this Summons, to-wit: within sixty (60) days after the 24th day of May, 1930, and defend the above entitled action in the above entitled Court, and answer the Complaint of the plaintiff and serve a copy of your Answer upon the undersigned attorneys for plaintiff at their office below stated, and in case of your failure so to do, judgment will be rendered against you according to the demand of

the Complaint, which has been filed with the clerk of said Court. The object of this action is to determine the rights of this plaintiff on a policy of war risk insurance issued to the deceased.

W. G. BEARDSLEE,  
GRAHAM K. BETTS,  
WRIGHT & WRIGHT,  
Attorneys for Plaintiff.

Office and Post Office Address: 1401 Smith Tower,  
Seattle, Washington (3108.)

Publisher's Affidavit Endorsed: Filed July 8,  
1930. [16]

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(Title of Court and Cause.)

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto through their respective attorneys, that a jury trial in the above cause be and the same hereby is waived and both parties hereby consent to trial of the said action before the Court without a jury.

Dated this 12th day of December, 1930.

WRIGHT & WRIGHT,  
GRAHAM K. BETTS,  
Attorney for Plaintiff.

ANTHONY SAVAGE,  
United States District Attorney.

E. I. BURNS,  
Attorney for U. S. Veterans Bureau.

[Endorsed]: Filed [Date not legible] [17]

(Title of Court and Cause.)

EXCERPT FROM TRIAL RECORD SHOWING  
DEFAULT AS TO DEFENDANT LILLY  
GLADYS WHITEHEAD.

Now on this 18th day of December, 1930, trial of the above entitled cause is resumed pursuant to adjournment. \* \* \*. Both sides rest. Counsel for the defendant moves for a dismissal and for judgment. Counsel renews motion for non-suit as to both causes of the action. Said cause is argued by counsel and judgment is entered in favor of the plaintiff. The defendant is to be allowed certain costs, \$67.90. Proclamation is made as to Lilly Gladys Whitehead who failed to appear and there is no response. The defendant excepts to the findings of the court. A judgment is directed to be prepared.

Journal No. 18, at Page 845. [18]

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(Title of Court and Cause.)

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW.

This matter having come on regularly for trial before the undersigned judge of the above entitled Court, without a jury, plaintiff appearing by her attorney, Graham K. Betts, defendant appearing by its attorneys, Anthony Savage, United States Attorney, and Cameron Sherwood, Assistant United States Attorney, for the Western District of Wash-



ington, and E. I. Burns, Special Counsel for the United States Veterans' Bureau, and additional defendant failing to appear and having been adjudged to be in default, and plaintiff having offered and submitted her evidence, and the defendant having offered and submitted its evidence, and the additional defendant offering no evidence, and the Court having heard the evidence and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law herein:

## FINDINGS OF FACT.

### I.

That the plaintiff is the duly qualified and acting administratrix of the estate of James W. Whitehead, Deceased, having been appointed as administratrix of said estate in [19] Seattle, King County, Washington; that the plaintiff is now a resident of Seattle, Washington; that the plaintiff is the mother of the deceased, and at the time of his death, and prior thereto, was wholly dependent on him for support.

### II.

That James W. Whitehead enlisted for military service with the United States Army in the month of July, 1918, and was honorably discharged therefrom on the 20th day of November, 1918.

### III.

That immediately upon enlisting, desiring to be insured against the risks of war, the said James W. Whitehead applied for a policy of War Risk Insur-

ance in the sum of \$10,000.00, designating no authorized person as beneficiary on said policy; that thereafter there was deducted from his monthly pay as premium for said insurance the sum of \$6.60 per month, and a policy of insurance was duly issued to him, by the terms whereof, the defendant agreed to pay said James W. Whitehead the sum of \$57.50 per month in the event he suffered total and permanent disability, or in the event of his death to make 240 such payments to his estate, and that the premiums were paid thereon to November, 1918, only.

#### IV.

That said James W. Whitehead died of paresis, superinduced by constitutional lues (syphilis), on the 30th day of September, 1921.

#### V.

That said James W. Whitehead was at no time after discharge, until July 27, 1921, suffering from a compensable disability within the purview of the laws and regulations affecting the administration of veterans' affairs by the [20] United States Veterans' Bureau.

#### VI.

That said James W. Whitehead became totally and permanently disabled on July 27, 1921.

#### VII.

That the policy of insurance, aforesaid, issued to the said James W. Whitehead, lapsed for non-payment of premiums November 31, 1918, and was not

in force and effect at the time said James W. Whitehead became totally and permanently disabled on July 27, 1921; that no premiums were paid by said insured, James W. Whitehead, nor by anyone on his behalf, subsequent to November 31, 1918, the date of lapsation of said insurance, or prior to the beginning of permanent and total disability of said insured, July 27, 1921.

### VIII.

That said James W. Whitehead was not totally and permanently disabled at the time of his discharge on November 20, 1918, but was able-bodied and worked continuously at a substantially gainful occupation, to-wit, as a switchman and switch foreman, from November, 1918, until November, 1920, earning during that period the same wages paid to men engaged in like employment, to-wit, wages ranging from \$5.11 a day to \$6.40 a day; he, the said James W. Whitehead, working not less than thirteen days in each month during said twenty-five months, the period of his employment as a switchman and switch foreman; that said James W. Whitehead, during such period of employment, received several certificates of merit from his superiors for efficient work, and his salary was, from time to time, raised by his employers. [21]

### IX.

That said James W. Whitehead was guilty of misconduct while in the service, prohibiting the granting to him by the United States Veterans' Bureau

of a compensation disability rating for the purposes of compensation.

X.

That a judgment for costs in the sum of \$67.90 in cause Number 12140 in the above entitled Court remains unsatisfied by plaintiff herein, and is a proper offset against any judgment obtained by plaintiff in this cause.

DONE in open Court this ..... day of December, 1930.

.....,  
United States District Judge.

Presented and refused 12/29/30.

NETERER,  
Judge.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That the plaintiff is not entitled to recover on either cause of action herein.

II.

That both of said causes of action herein should be dismissed and the defendant have judgment for its costs and disbursements herein.

DONE in open Court this..... day of December, 1930.

.....  
United States District Judge.

Presented and refused 12/21/31.

NETERER. [22]

Received a copy of the within proposed findings of fact and Conclusions of Law this 24 day of Dec. 1930.

GRAHAM K. BETTS,  
Attorney for Plff.

[Endorsed]: Filed Dec. 29, 1930. [23]

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(Title of Court and Cause.)

EXCEPTIONS OF DEFENDANT TO COURT'S  
FAILURE TO MAKE AND ENTER FIND-  
INGS OF FACT AND CONCLUSIONS OF  
LAW PROPOSED BY DEFENDANT.

Comes now the defendant, United States of America, by Anthony Savage, United States Attorney, and Cameron Sherwood, Assistant United States Attorney, for the Western District of Washington, and makes exceptions herein as follows:

I.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of Fact No. I.

II.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of Fact No. II.

III.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. III.

## IV.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. IV.

## V.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. V. [24]

## VI.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. VI.

## VII.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. VII.

## VIII.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. VIII.

## IX.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. IX.

## X.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. X.

## XI.

Defendant excepts to the refusal of the Court to make and enter defendant's requested conclusion of law No. I.

XII.

Defendant excepts to the refusal of the Court to make and enter defendant's requested conclusion of law No. II.

Exceptions, hereinabove noted, allowed.

DONE in open Court this 29th day of December, 1930.

NETERER,  
United States District Judge.

[Endorsed]: Filed Dec. 29, 1930. [25]

---

(Title of Court and Cause.)

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW.

This matter having come on for trial before the undersigned Judge of the above entitled Court sitting without a jury on the 17th day of December, 1930, the plaintiff appearing in person and by her attorney, Graham K. Betts, the defendant, United States of America, appearing by Cameron Sherwood, Assistant United States Attorney and E. I. Burns, Special Counsel of the United States Veteran's Bureau, and the defendant, Lilly Gladys Whithead failing to appear either in person or by counsel, proclamation having been made and default ordered against the said defendant Lilly Gladys Whithead, evidence having been adduced by both parties and arguments having been made in support thereof,

the Court being fully advised in the premises makes the following Findings of Fact.

## FINDINGS OF FACT.

### I.

That the deceased, James W. Whithead, enlisted for service in the United States Army in July 1918 and was honorably discharged therefrom on the 20th day of November on a surgeon's certificate of disability.

### II.

That during the plaintiff's military service he applied [26] for and was granted a Policy of War Risk Insurance of \$10,000.00 and premiums were paid thereon during his service in the United States Army.

### III.

That the plaintiff is the duly appointed, qualified and acting administratrix of the estate of James W. Whithead, deceased, in Seattle, King County, Washington.

### IV.

That during the period of service of the deceased in the United States Army, he became afflicted with paresis by reason of said disease, he was discharged on the 20th day of November, 1918, totally and permanently disabled from following continuously any substantially gainful occupation, and as a result of which disease he died on the 30th day of September, 1921 in the State Insane Asylum, by reason whereof he became entitled to receive from



the defendant the sum of \$57.50 per month commencing on the said 20th day of November, 1918.

V.

That on said date of discharge to wit: November 20th, 1918, the policy of insurance herein sued upon was in full force and effect.

VI.

That a judgment for costs in the sum of \$67.90 in a cause number 12140 in the above entitled Court remains unsatisfied by the plaintiff herein and is a proper offset against plaintiff's judgment herein.

VII.

That the defendant, Lilly Gladys Whitehead was duly and regularly served in this action by publication made in the manner provided by order of this Court made and entered on the 15th day of April, 1930. [27]

VIII.

That the Defendant, United States of America has disagreed with the Plaintiff as to her claim.

DONE in open Court this 29th day of December, 1930.

(Signed) JEREMIAH NETERER,

Judge.

And from the foregoing Findings of Fact, the Defendant makes and enters the following

## CONCLUSIONS OF LAW.

## I.

That the Defendant has jurisdiction of the parties and of the subject matter of this action.

## II.

That the Plaintiff is entitled to recover from the Defendant, United States of America, the sum of \$57.50 per month commencing on the 20th day of November, 1918.

Done in open Court this 29th day of December, 1930.

JEREMIAH NETERER,

Judge.

Received a copy of the within Findings that 29th day of Dec., 1930.

ANTHONY SAVAGE,

Attorney for Deft.

[Endorsed]: Filed Dec. 29, 1930. [28]

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(Title of Court and Cause.)

EXCEPTIONS TO FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AS MADE  
AND ENTERED BY THE COURT.

Comes now the defendant, United States of America, by Anthony Savage, United States Attorney, and Cameron Sherwood, Assistant United States Attorney for the Western District of Washington,

and makes the following exceptions to the findings of fact and conclusions of law as made and entered by the Court:

I.

Defendant excepts to Finding of Fact No. IV on the ground that there was no competent proof tending to show that deceased became afflicted with paresis during the period of service in the United States Army, and that there was no competent proof tending to show that deceased was totally and permanently disabled from following continuously any substantially gainful occupation at the time of discharge from the United States Army on November 20, 1918; and on the further ground that the uncontroverted evidence adduced at trial showed that said decedent was, for a period of two years immediately after discharge from the United States Army, able-bodied, and that he carried on continuously a substantially gainful occupation, to-wit, that of switchman and switch foreman, earning the same wages and doing the same [29] work as others engaged in like occupations at the same time.

II.

Defendant excepts to Conclusion of Law No. II as made by the Court on the ground that there was no evidence upon which to base such a conclusion of law; the evidence on the contrary, showing that plaintiff is not entitled to recover from the defendant, United States of America, in the sum of \$57.50 per month, or any other sum whatsoever.

Exceptions, hereinabove noted, allowed.

DONE in open Court this 29th day of December, 1930.

NETERER,

United States District Judge.

[Endorsed]: Filed Dec. 29, 1930. [30]

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United States District Court, Western District of  
Washington, Northern Division.

No. 20072.

JESSIE SMITH, Administratrix of the Estate of  
JAMES W. WHITEHEAD, Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

### JUDGMENT.

This matter having come duly on for trial before the Honorable Jeremiah Neterer, Judge of the above entitled Court sitting without a jury on the 17th day of December, 1930, the Plaintiff appearing in person and by her attorney, Graham K. Betts, the Defendant, United States of America appearing by Cameron Sherwood, Assistant United States Attorney and E. I. Burns, Special Counsel of the United States Veteran's Bureau, and the Defendant, Lilly Gladys Whitehead, failing to appear and the respective parties having introduced *there* evidence

and having made argument in support thereof and the Court being fully advised in the premises having on the 18th day of December, 1930 rendered a judgment in favor of the Plaintiff and having subsequently thereto made and entered its Findings of Fact and Conclusions of Law, NOW, THEREFORE in accordance therewith,

IT IS ORDERED ADJUDGED AND DECREED that the Plaintiff as administratrix of the estate of James W. Whithead, deceased have and recover against the Defendant, United States of America the sum of \$8,337.50, said amount being the accruing instalments of \$57.50 per month due the estate of James W. Whithead, Deceased, commencing on the 20th day of November, 1918, and continuing to and including the installment due the 20th day of November, 1930 said latter date being the last due date of payment hereunder prior to the rendition of judgment, such payments to be made as by law in such cases provided, and

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Graham K. Betts is entitled to receive from said judgment as a reasonable attorney fee for his services as attorney for the Plaintiff herein, the sum of \$833.75, that being 10% of the said \$8337.50 now due the estate of James W. Whithead, Deceased and the said Graham K. Betts, his heirs, executors or assigns is further entitled to receive the sum of 10% of each and every other payment hereinafter made to the heirs, executors, ad-

ministrators or assigns of the estate of James W. Whithead, Deceased or to the beneficiaries [31] of the deceased, made by reason of or as a consequence of the entrance of this judgment, such payments to be made as by law in such cases provided, and

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Defendant, United States of America offset against the foregoing judgment award to the Plaintiff the sum of \$67.90 said amount being due the United States by this Plaintiff as administratrix of the estate of James W. Whitehead, deceased, by reason of an unsatisfied judgment for costs in cause number 12140 in the above entitled Court.

To all of which the Defendant excepts and its exception is hereby allowed.

Done in open Court this 29th day of December, 1930.

JEREMIAH NETERER,  
Judge.

O. K.

CAMERON SHERWOOD,  
Ass't U. S. Atty.

O. K. as to form.

LESTER E. POPE,  
Atty. U. S. V. B.

[Endorsed]: Filed Dec. 29, 1930. [32]

(Title of Court and Cause.)

MOTION FOR NEW TRIAL.

Comes now the defendant, the United States of America, by Anthony Savage, United States Attorney for the Western District of Washington, Cameron Sherwood, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney for the United States Veterans' Bureau, and petitions the Court for an order granting a new trial in the above entitled cause, for the following reasons, to-wit:

(1) Error in law occurring at the trial and duly excepted to by the defendant.

(2) Insufficiency of the evidence to justify the verdict.

(3) That the Court erred in denying defendant's Motion for Nonsuit at the conclusion of plaintiff's evidence.

(4) That the Court erred in denying defendant's motion for judgment at the conclusion of the entire case.

(5) That the Court erred in denying defendant's motion for nonsuit renewed at the close of all the testimony.

ANTHONY SAVAGE,

United States Attorney.

CAMERON SHERWOOD,

Assistant United States Attorney.

LESTER E. POPE,

Regional Attorney, U. S. Veterans' Bureau.

Received copy of the within motion this 24 day of Dec. 1930.

GRAHAM K. BETTS,  
Atty. for Plff.

[Endorsed]: Filed Dec. 26, 1930. [33]

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(Title of Court and Cause.)

ORDER DENYING MOTION FOR NEW TRIAL

THIS MATTER having come before the above entitled Court on the motion of the defendant herein for a new trial, and both parties having submitted said motion to the Court for ruling thereon, without argument, and the Court being duly advised in the premises; now, therefore, it is hereby

ORDERED and ADJUDGED that the defendant's motion for a new trial herein be, and the same hereby is, denied, and an exception is noted on behalf of the defendant.

DONE in open Court this 29 day of December, 1930.

JEREMIAH NETERER,  
United States District Judge.

O. K. as to form.

GRAHAM K. BETTS,  
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 29, 1930. [34]



(Title of Court and Cause.)

**STIPULATION.**

IT IS HEREBY STIPULATED between the parties to the above entitled action, by and through their respective attorneys of record, that the defendant herein may have up to and including the 20th day of March, 1931, in which to lodge and settle its proposed Bill of Exceptions herein.

Dated at Seattle, Washington, this ..... day of February, 1931.

ANTHONY SAVAGE,  
United States Attorney.  
CAMERON SHERWOOD,  
Assistant United States Atty.  
GRAHAM K. BETTS,  
Attorney for Plaintiff.

[Endorsed]: Filed Febr. 2, 1931. [35]

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(Title of Court and Cause.)

**ORDER.**

Upon application of the defendant herein, and pursuant to stipulation of both parties, it is hereby ORDERED that defendant herein may have up to and including the 1st day of March, 1931, in which to lodge its proposed Bill of Exceptions herein, and have same settled.

Done in open Court this 2nd day of February, 1931.

JEREMIAH NETERER,  
United States District Judge.

[Endorsed]: Filed Febr. 2, 1931. [36]

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(Title of Court and Cause.)

STIPULATION.

It is HEREBY STIPULATED between the parties to the above entitled action, by and through their respective attorneys of record, that the defendant herein may have up to and including the 20 day of March, 1931, in which to lodge and settle its proposed Bill of Exceptions herein.

Dated at Seattle, Washington, this 5 day of March, 1931.

ANTHONY SAVAGE,  
United States Attorney.  
CAMERON SHERWOOD,  
Assistant United States Attorney.  
GRAHAM K. BETTS.  
Attorney for the Plaintiff.

[Endorsed]: Filed Mar. 5, 1931. [37]

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(Title of Court and Cause.)

ORDER.

Upon application of the defendant herein, and pursuant to stipulation of both parties, it is hereby

ORDERED that defendant herein may have up to and including the 20th day of Mar., 1931, in which to lodge its proposed Bill of Exceptions herein, and have same settled.

Done in open Court this 5 day of March, 1931.

JEREMIAH NETERER,  
United States District Judge.

Received copy of within Order this 5th day of March, 1931.

GRAHAM K. BETTS,  
Atty. for Plaintiff.

[Endorsed]: Filed Mar. 5, 1931. [38]

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(Title of Court and Cause.)

NOTICE OF APPEAL.

To JESSIE SMITH, Plaintiff, and GRAHAM K. BETTS, Attorney for said Plaintiff:

YOU and EACH OF YOU will please take notice that the United States of America, defendant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order entered in the above entitled cause on the 29th day of December, 1930, and that the certified transcript

of record will be filed in the said Appellate Court within thirty days from the filing of this Notice.

ANTHONY SAVAGE,

United States Attorney.

CAMERON SHERWOOD,

Assistant United States Attorney.

LESTER E. POPE,

Regional Attorney, U. S. Veterans' Bureau.

Received a copy of within Notice of Appeal this 5th day of March, 1931.

GRAHAM K. BETTS,

[Endorsed]: Filed Mar. 9, 1931. [39]

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(Title of Court and Cause.)

PETITION FOR APPEAL.

The above named defendant, feeling itself aggrieved by the order, judgment and decree made and entered in this cause on the 29th day of December, 1930, does hereby appeal from the said order, judgment and decree in each and every part thereof to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors herein, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order, judgment and decree was based, duly authenticated, be sent to

the United States Circuit Court of Appeals for the Ninth Circuit, as by the rules of said Court in such cases made and provided.

ANTHONY SAVAGE,

United States Attorney.

CAMERON SHERWOOD,

Assistant United States Attorney.

LESTER E. POPE,

Regional Attorney, U. S. Veterans Bureau.

Received a copy of the within Petition for Appeal this 5th day of March, 1931.

GRAHAM K. BETTS,

Atty. for Plff.

[Endorsed]: Filed Mar. 9, 1931. [40]

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(Title of Court and Cause.)

#### ASSIGNMENTS OF ERROR.

Comes now the United States of America, defendant in the above entitled action, by Anthony Savage, United States Attorney for the Western District of Washington, Cameron Sherwood, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney, United States Veterans Bureau, Seattle, and in connection with its petition for an appeal herein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause, and which were

duly excepted to by it at the time of said trial herein, and upon which it relies to reverse the judgment herein.

### I.

That the Court erred in overruling defendant's objection to the introduction of Bureau ratings, they being defendant's Exhibit , on the ground that they were immaterial.

### II.

That the Court erred in overruling defendant's objection to the introduction of Bureau reports of physical examinations of plaintiff, they being Exhibit No. , on the ground that they were not properly identified, and on [41] the further ground that the government had no opportunity to cross examine the physicians who made the reports.

### III.

That the Court erred in refusing to admit in evidence the personnel records of the Great Northern Railway and the report of physical examination made for the railroad by Dr. Flynn, they being defendant's Exhibit No. for identification.

### IV.

That the Court erred in awarding judgment to the Administratrix of plaintiff's estate of insurance installments accruing subsequent to the veteran's death when there was no evidence offered to show that there was no designated beneficiary of said insurance.

V.

That the Court erred in failing and refusing to dismiss the second cause of action of plaintiff's complaint for want of jurisdiction, and on the further ground that the decision of the United States Veterans Bureau on such a compensation matter is conclusive, final, and not subject to jurisdictional review.

VI.

That the Court erred in denying defendant's motion for a non-suit made at the close of plaintiff's case and renewed at the close of all of the testimony, for the reason that plaintiff did not prove permanent and total disability of James W. Whitehead during the time his policy was in effect, to which denial of said motions defendant took exceptions, and exceptions allowed. [42]

VII.

That the Court erred in entering judgment in favor of plaintiff as the evidence was insufficient to sustain such judgment.

VIII.

That the Court erred in denying defendant's motion for a new trial, to which denial exception was noted by defendant.

IX.

That the Court erred in refusing to make and enter Finding of Fact No. III, proposed by defendant, which is as follows:

That immediately upon enlisting, desiring to be insured against the risks of war, the said James W. Whitehead applied for a policy of War Risk Insurance in the sum of \$10,000.00, designating no authorized person as beneficiary on said policy; that thereafter, there was deducted from his monthly pay as premium for said insurance the sum of \$6.60 per month, and a policy of insurance was duly issued to him, by the terms whereof, the defendant agreed to pay said James W. Whitehead the sum of \$57.50 per month in the event he suffered total and permanent disability, or in the event of his death to make 240 such payments to his estate, and that the premiums were paid thereon to November, 1918, only.

To which failure defendant noted an exception.

#### X.

That the Court erred in failing and refusing to make and enter Finding of Fact No. IV proposed by defendant, which is as follows:

That James W. Whitehead died of paresis, superinduced by constitutional lues (syphilis), on the 30th day of September, 1921.

To which refusal defendant noted exception. [43]

#### XI.

That the Court erred in its failure and refusal to make and enter Finding of Fact No. V proposed by defendant, which is as follows:



That said James W. Whitehead was at no time after discharge, until July 27, 1921, suffering from a compensable disability within the purview of the laws and regulations affecting the administration of veterans' affairs by the United States Veterans' Bureau.

To which failure defendant duly excepted.

## XII.

That the Court erred in its failure and refusal to make and enter Finding of Fact No. VI proposed by defendant, which is as follows:

That said James W. Whitehead became totally and permanently disabled on July 27, 1921.

To which failure defendant noted exception.

## XIII.

That the Court erred in its failure and refusal to make and enter Finding of Fact No. VII, proposed by defendant, which is as follows:

That the policy of insurance, aforesaid, issued to the said James W. Whitehead, lapsed for non-payment of premiums November 31, 1918, and was not in force and effect at the time said James W. Whitehead became totally and permanently disabled on July 27, 1921; that no premiums were paid by said insured, James W. Whitehead, nor by anyone on his behalf, subsequent to November 31, 1918, the date of lapsation of said insurance, or prior to the

beginning of permanent and total disability of said insured, July 27, 1921.

To which failure defendant noted exception.

#### XIV.

That the Court erred in its failure and refusal to make and enter Finding of Fact No. VIII, proposed by defendant, which is as follows: [44]

That said James W. Whitehead was not totally and permanently disabled at the time of his discharge on November 20, 1918, but was able-bodied and worked continuously at a substantially gainful occupation, to-wit, as a switchman and switch foreman, from November, 1918, until November, 1920, earning during that period the same wages paid to men engaged in like employment, to-wit, wages ranging from \$5.11 a day to \$6.40 a day; he, the said James W. Whitehead, working not less than thirteen days in each month during said twenty-five months, the period of his employment as a switchman and switch foreman; that said James W. Whitehead, during such period of employment, received several certificates of merit from his superiors for efficient work, and his salary was, from time to time, raised by his employers.

To which failure defendant noted exception.

#### XV.

That the Court erred in its failure and refusal to make and enter Finding of Fact No. IX proposed by defendant, which is as follows:

That said James W. Whitehead was guilty of misconduct while in the service, prohibiting the granting to him by the United States Veterans' Bureau of a compensation disability rating for the purposes of compensation.

To which failure defendant noted exception.

XVI.

That the Court erred in its failure and refusal to make and enter Conclusion of Law No. I proposed by defendant, which is as follows:

That the plaintiff is entitled to recover on either cause of action herein.

To which refusal defendant duly noted its exception.

XVII.

That the Court erred in its failure and refusal to make and enter Conclusion of Law No. II proposed by defendant, which is as follows:

That both of said causes of action herein should be dismissed and the defendant have judgment for its costs and disbursements herein.

To which refusal defendant duly noted its exception. [45]

XVIII.

That the Court erred in making and entering plaintiff's Finding of Fact No. IV, which is as follows:

That during the period of service of the Deceased in the United States Army, he became

afflicted with paresis by reason of said disease, he was discharged on the 20th day of November, 1918, totally and permanently disabled from following continuously any substantially gainful occupation, and as a result of which disease he died on the 30th day of September, 1921, by reason whereof he became entitled to receive from the Defendant the sum of \$57.50 per month commencing on the said 20th day of November, 1918.

To which Finding Defendant duly entered its exception.

#### XIX.

That the Court erred in making and entering plaintiff's Conclusion of Law No. II, which is as follows:

That the Plaintiff is entitled to recover from the Defendant, United States of America, the sum of \$57.50 per month commencing on the 20th day of November, 1918.

To the entry of which defendant duly entered its exception.

#### XX.

That the Court erred in denying defendant's motion to strike the testimony of witness Renche, on the ground that it was too indefinite, to which de-

nial the defendant duly entered its exception.

ANTHONY SAVAGE,  
United States Attorney.  
CAMERON SHERWOOD,  
Assistant United States Attorney.  
LESTER E. POPE,  
Regional Attorney,  
U. S. Veterans' Bureau.

Received a copy of the within Assignment of Errors this 5 day of March 1931.

GRAHAM K. BETTS,  
Attorney for Plff.

[Endorsed]: Filed Mar. 10, 1931. [46]

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(Title of Court and Cause.)

DEFENDANT'S PROPOSED BILL OF  
EXCEPTIONS.

BE IT REMEMBERED that heretofore and on, to wit: the 17th day of December, 1930, at the hour of 4 o'clock P. M., the above entitled cause came regularly on for trial in the above entitled Court before the Honorable Jeremiah Neterer, one of the judges of said Court, sitting without a jury;

The plaintiff being represented by Graham Betts, Esq., her attorney and counsel;

The defendant, United States of America, being represented by Cameron Sherwood, Esq., Assistant

United States Attorney, and Erwin I. Burns, Esq., Special Attorney of the United States Veterans Bureau, its attorneys and counsel;

WHEREUPON, the following proceedings were had and testimony taken, to wit:

Mr. DeWOLFE.—The jury is waived by stipulation, which has been filed.

Mr. BETTS.—I drew up an amended complaint stating two causes of action; in the first cause of action I [47] omitted to allege disagreement; I filed a stipulation, the first cause of action was amended to include the disagreement.

Mr. DeWOLFE.—Disagreement as to the first cause of action. We admit disagreement as to the first cause of action, but deny disagreement as to the alleged revived insurance under Section 305 by means of uncollected and undue compensation.

The COURT.—Let the record show a disagreement is admitted as to the first cause of action.

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C. R. CHRISTIE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is C. R. Christie, and I am employed by the United States Veterans' Bureau in Seattle. I have custody of the files of James W. Whitehead, deceased. I have a certified copy of his discharge.

(Testimony of C. R. Christie.)

Plaintiff's exhibit being certified copy of discharge, received in evidence.

I have a certified copy of this claimant's service record including the examination at enlistment, at discharge, treatment while he was in the Service, certified to by the Secretary of War. I have a rating sheet of the Board of Appeals dated January 1, 1922.

Plaintiff's exhibit No. 2 being rating sheet of January 1, 1922, offered in evidence.

Mr. BURNS.—I object to the introduction of that rating sheet as there is no rating properly admissible other than the last rating made by the Bureau, in that the Bureau has a right to change the ratings at any time. [48]

Mr. BETTS.—It goes to the question of arbitrariness of their change.

The COURT.—Admitted.

Mr. BURNS.—Exception.

Plaintiff's exhibit No. 3 admitted in evidence.

The COURT.—(Referring to plaintiff's exhibit No. 3). I don't think the Court ought to admit this. I will admit the examination upon which this was predicated, the medical examination.

Mr. BETTS.—I offer plaintiff's exhibit No. 4, being an examination by Dr. Burke dated August 26, 1921.

(Testimony of C. R. Christie.)

Mr. BURNS.—I object to the report of the examination in that the Government is deprived of its right of cross-examination by the introduction of the report and, moreover, that the examination contains a history as reported by the man, consisting of self-serving declarations.

The COURT.—Objection overruled. It is a Government document made by the Government.

Mr. BURNS.—Exception.

Plaintiff's exhibit No. 4 admitted.

I am familiar with the method of determining compensation. I am familiar with determining service connection of disability. There are numerous disabilities and various ways to determine service connection and no one method would apply to all disabilities. I am familiar with the files in this case. Service connection in this case was originally based upon a venereal disease which was found to exist in service, which was reviewed by the Rating Board, after claim for compensation had been filed and was held by the Rating Board that the condition had existed prior to the enlistment, as the records showed by the man's own statement and that the service had aggravated a pre-existing disability [49] and that service connection and compensation were allowed upon that reason. Service connection has since that time been denied. I have the order disallowing service connection.



(Testimony of C. R. Christie.)

Mr. BURNS.—The Government is willing to stipulate that he has been totally and permanently disabled since July 27th, 1921.

Mr. BETTS.—I will offer at this time plaintiff's exhibit No. 6, being a notification of reversal of the rating reinstating the insurance.

Mr. BURNS.—No objection.

Mr. BETTS.—I offer plaintiff's exhibit No. 7, being a rating issued showing the disability that plaintiff had and from which he died.

Plaintiff's exhibit No. 8 offered in evidence, same being final rating showing cause of death and disability from which he died.

Mr. BURNS.—No objection.

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CARL A. WHITEHEAD, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is Carl A. Whitehead and I am a brother of James W. Whitehead, deceased. I saw my brother the day after he got out of the army. He was nervous in his speech. He mumbled in his speech. He mumbled especially with the letter "l". It seemed he could not say the word. He was different. His mental attitude was bad. He would wander

(Testimony of Carl A. Whitehead.)

in his conversations and wouldn't hold to the conversation. I had lots of conversations with him. He would be talking along, and then get off on another subject entirely. I saw him quite frequently after that. He lost a lot of weight. He was losing weight all the time. I talked with him each time I saw him. Dr. Corson was treating him. He went to work a short time after [50] he got out of the army at his old job, switching for the Great Northern. This was the same position he had before he went in the service. I think he worked there from the fall of 1918 until the fall of 1920, but he did not work steady. He was sick part of the time. He tried to drive a truck for me but he could not do it. Once the engine was stopped and he called out and said the truck would not run. He was just dumbfounded. There was nothing the matter with the truck. He just failed to crank it. He didn't know what to do. He didn't work steady—just an hour or two, filling in with the work. I don't recall that he did any other work. He was very nervous. His difficulty in holding a conversation continued until the time he died. Towards the last he was terrible. He would stutter after he came back from the army. When he tried to say the word "letter", he couldn't say it at all—couldn't say anything with an "l" in it. That condition was peculiar to him after he came out of the service. It was only after he came out of the service. He did not have it before he went into service. I noticed it right after he first came out. He worked

(Testimony of Carl A. Whitehead.)

for me during 1919 for a few days when there was nothing doing on the railroad. Then he went back to the railroad. He was on the extra list. He wasn't working steady. He couldn't say a word plain. He stuttered. He was never like that before.

Cross Examination by Mr. BURNS.

I am familiar with the signature of my brother. I would say that is his writing.

Mr. BURNS.—These are payrolls of the Great Northern Railroad Company.

Mr. BETTS.—I admit that those are his railroad payroll records.

Records marked defendant's exhibit A. [51]

That paper contains the signature of my brother.

Mr. BURNS.—This document is application for employment with the railroad company of James Whitehead. My brother worked for the railroad company before he went into the service. He went back to his old job upon discharge. He did not work steady up to 1920.

Re-direct Examination by Mr. BETTS.

He was an officer of the switchman's union either before or after service.

H. W. DONAHUE, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is H. W. Donahue. I was employed by the Great Northern Railroad Company at the time Mr. Whitehead was—1918, 1919 and 1920. I knew Mr. Whitehead. He went back to work as soon as he was discharged from the army. I do not know how long he continued to work. He was working extra as a switchman. Sometimes he worked two or three times a week, and sometimes a whole week. The oldest men on the road had the preference. When he came out of the army I noticed he was not the same Jim Whitehead because he was my partner. He and I roomed together and chummed together before he went into the service, while he was selling newspapers, and I am acquainted with his parents. He worked practically two weeks on and off after he got out of the army. He could not work steady on account of sickness. He acted like a man that was demented. It commenced right after he came out of the service. I asked him to cut out some cars and gave him a slip of paper and he brought out the wrong cars. That was during November, about November 10th or 12th. That was my first inkling that he was not right. That was five or six days [52] after he came out of the service. His conduct in the employ was very good. He acted kind of hesitating. He would hesitate when you

(Testimony of H. W. Donahue.)

would tell him anything. He would wander off in conversation at random. He did not execute his orders very well. When I would tell him to bring out a certain car, sometimes he would bring it out, and sometimes he would not. I noticed when he first got out of the service he hesitated when he talked. I had many conversations with him day in and day out. He would jump off each subject from one thing to another. It might have been a year after he got out. I was out to his house for Sunday dinner—a lovely chicken dinner. He started crying, saying there was nothing fit to eat, complaining that all his mother gave him was “this same old beef”, when it was chicken. He was working under me most of the time he was with the railroad. A crew consists of three men—the foreman and two helpers, and usually they spread out, doing the work. We would send one man here and another man here, and another man there. He did his work after a fashion. He was not the same switchman as far as efficiency as before. He would not pick up the right cars. I couldn't trust him. I was never sure of him. I am an engine foreman, of the switch engine crew.

#### Cross Examination by Mr. BURNS.

My duties as a foreman of the switching crew were switching cars. I was in charge of a crew made up of two men and myself. Mr. Whitehead was night foreman for a part of the time as extra. I don't think he was foreman ten nights in his railroad ca-

(Testimony of H. W. Donahue.)

reer. He was required to do the same duties that I did when he was foreman. The oldest man in the service is given the preference. The jobs are not given because of ability. He worked not to exceed two [53] years prior to the war. I got him his position. Efficiency and skill and ability mean no more on the Great Northern than on any other railroad. It is merely how long a man has been in the service. That is why I am foreman. It is not a case of my ability. The railroad did not issue credit and demerit reports. They censured you, but never gave you credit. I know that Whitehead got demerits before the war. Ability has no bearing on it whatsoever. Those are credits given Mr. Whitehead on July 1st, 1920, and January 1st, 1921. I didn't get any credits—I got demerit marks. The superintendent rated the letters. I noticed nothing wrong with him before he went in the service.

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W. H. HORTON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is W. H. Horton. I knew James Whitehead during his lifetime. I worked with him as a switchman. I saw him when he came back to the Great Northern after his discharge. I do not know the exact date. I noticed that he was not the same,—his hesitant motion to take care of his work. This

(Testimony of W. H. Horton.)

manifested itself on several occasions. I was foreman of another crew at Smith's Cove. It was very important that you cut in the correct car to the ship. At different times he would get into awful jangles as to the work not being done and Jim would feel bad about it. He would know after I would call him about the mistakes. He would feel bad about it and become sulky. I worked with him before and after the war. On one occasion I very nearly had a serious accident on a passenger train in throwing the [54] wrong switch in allowing some cars to go on the main line. It was just a miracle we stopped the passenger train. He was not responsible in different ways. Being a Brother, we would overlook all these things, instead of turning him in to the officials. He would do the work and have everything come out well. There were three of us on the ground, five in the crew. He was on the ground crew. The rest of the men helped him with his work. I don't remember when he let the freight car on the main line—it was quite a while after he came out of the service. It was some time before he went out of the employ. He would not carry his conversation very long. When you instructed him at his work he would get out of his tracks and go onto something else instead of paying attention to what he was being told. He would go away mumbling to himself.

Cross Examination by Mr. BURNS.

I was doing the same work the insured was doing. I worked along with him. I made no record of this

(Testimony of W. H. Nichols.)

incident I spoke of. I worked with Mr. Whitehead all his time before the war and after the war at different intervals. He would sometimes work with me and sometimes with the other men. The Great Northern would issue credit slips for skillful work.

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W. H. NICHOLS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is W. H. Nichols. I knew James Whitehead. I was working with him on the Great Northern railroad, off and on after he came back from the army. I saw him very shortly after he came back. I was engine foreman—switching [55] engine work. He would mumble and seem to be nervous and unstable at times—more so than at others. I can't say yes or no that I noticed anything peculiar about his speech. It was quite a time ago. I never paid much attention. I never talked with the men except to tell them what to do. He did his work at times very well. At other times he was not there. You could not depend upon him. Sometimes he would do it and sometimes he would not do it right at all.



MRS. JESSIE SMITH, called as a witness in her own behalf, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is Jessie Smith and I am the plaintiff in this action. I am the mother of James W. Whitehead, and the administratrix of his estate. I saw him the day or day after he came back from the army at my home. He was smaller than when he went away. He was unstable in his speech. He was lost for about three weeks after his discharge papers came. He would write to me and state "you didn't get me out of this, if you don't get me out of this I will commit suicide." He would talk so loud, and sometimes he would be in the house days and never talk at all, and when he would talk, it would be excitedly. He stammered. He lived with me three or four months after he was out of the army. They called him "Goofy". I don't remember whether he worked regularly every day on the railroad. He was married and his wife lived there. He used to go to my mother's and stay back and forth. He would talk a whole string of stuff to me when he came home after work on the railroad. He was killing time and sometimes he would go back to town. I asked him to go home and go to bed. He couldn't sleep. He would kill time at home until his wife got off from [56] work, sometimes after midnight. I saw him at Sequim. That was in July, 1920; I think that was the

(Testimony of Mrs. Jessie Smith.)

year. I could not talk to him—I was afraid of exciting him. He went to work and scrubbed out the bathroom, and then he would scrub it again. He did this some four or more times after he got out of the army. The morning he went to Steilacoom he went in to scrub up the bathroom. He was committed to Steilacoom Hospital for the feebleminded in July, 1921.

Cross Examination by Mr. BURNS.

I cannot identify my son's signature on defendant's Exhibit A.

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DR. ROYAL B. TRACY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is Royal B. Tracy. I am a graduate of the University of Louisville, 1908. I am a physician—a specialist in nervous and mental diseases.

Mr. BURNS.—Qualifications admitted.

Paresis is a disease of the nervous system—a paralysis—particularly the brain tissue at first. It is a condition in which the individual has a softening of the brain, so that he has a scanning or stuttering speech. He becomes obtuse mentally, and becomes worse as the disease progresses. It lasts from three to seven years before death. He becomes mentally duller all the time. Ater a time they develop delu-

(Testimony of Dr. Royal B. Tracy.)

sions of grandeur. They imagine they have a million dollars when they have nothing in the bank; and other delusions of the reverse. This is caused by destruction of the sensation fibers of the brain. [57] Syphilis is the cause of paresis. All syphilitics do not get paresis. Paresis usually comes to the mentally alert. Syphilis attacks the nervous system that is the most active. If he is just an ordinary workman the chances are that he will have syphilis of the spinal cord. If he is mentally alert, the chances are that it will attack the brain. There is a possibility that he will have meningeal syphilis, but in all syphilis there is some inflammation of the brain cells. Syphilis is an infectious disease and hereditary also. The medical profession has not decided whether there is any difference in a development of paresis from syphilis whether it is infectious or hereditary. There is a disagreement as to that, if a person has had infectious syphilis and paresis develops when it is shown that the paresis developed from seven to ten years after the infection. If a person should have an injury of any kind or undergo an operation, the shock might start the syphilis which had been latent. I am not prepared to say that a triple typhoid inoculation would be such as to cause this. I have known a spinal puncture to cause it.

Mr. BETTS.—Assuming a history of a man being all right before he goes into the army, and while he was in the army he has a triple typhoid inoculation

(Testimony of Dr. Royal B. Tracy.)

and a spinal puncture and he is afterwards confined to the hospital until his discharge and is given an S. C. D. discharge for nervousness, and thereafter immediately returned to his former employment, and persons close to him immediately upon his discharge notice that his speech had changed so that he stuttered, particularly in such words as "ladder", that he mumbled and was not logical in his train of thought, that he couldn't keep up a train of conversation, that he was [58] at that time unable to execute orders in his employment that he had theretofore been able to execute, and that this condition progressed so that he became more irrational and more unstable, and that a year afterwards he didn't know chicken from beef, that he was two and one-half years after his discharge hospitalized and diagnosed as general paresis, and died some months after that,—can you formulate an opinion as to when that began?

Mr. BURNS.—I object to that hypothetical question on the ground that it does not state all the facts, that he misstates the facts. The question assumes that he was in good condition, when the record shows that he was treated for gonorrhoea and syphilis while in service and immediately after his enlistment. The question does not include that he worked continuously for two years; and it also includes the statement that he didn't know beef from chicken.

The COURT.—Include the fact that he worked for approximately two years.

(Testimony of Dr. Royal B. Tracy.)

Mr. BURNS.—Exception.

My opinion would be that he had paresis from the time that he came back. I say that the man, no doubt, in my mind, had a general paresis when he was discharged from the army, from the history of the case that has been given, and from the testimony these people have given. There is no doubt in my mind that it was general paresis and that it occurred some two or three years before that, and that this has been just the evidence manifesting itself toward the final dissolution of the man. The paresis had already occurred and was in progress at the time he was discharged. I believe that administration of a triple typhoid inoculation and spinal puncture did [59] aggravate the paresis. I have treated many syphilitic paresis cases. Work is likely to increase it, and make it run a more rapid course.

Cross Examination by Mr. SHERWOOD.

Q.—Assuming that this man had worked with the railroad company for two years at least prior to entry into the service, and soon after entry into service he was found to have syphilis and gonorrhoea, that he was discharged without gonorrhoea and syphilis, that he worked for two years, 1918 to 1920, as switchman on the railroad, doing the same work as other men engaged in the same employment for that period, that he showed some hesitancy of speech at some time during that period, and that he later was classified as totally and permanently disabled—

(Testimony of Dr. Royal B. Tracy.)

paresis, and died of paresis superinduced by syphilis, and assuming also as a part of the question, that he was examined in 1921, and diagnosed insomnia and intestinal enteritis, with no indication of paresis at that time; and assuming further the facts as stated by Mr. Betts, and that in addition he was examined on seven different dates from July 10 to September 24, 1920, by a reputable physician who certified at the time that he was suffering from intestinal enteritis and insomnia only, would you still say he was suffering from paresis at the time of his discharge in 1918?

A.—I am sure he suffered from paresis at the time he came out of the army, from the evidence.

Mr. BETTS.—The plaintiff rests.

Mr. BURNS.—At this time the Government moves for a non-suit with reference to the first cause of action on the ground that the evidence clearly shows that this [60] man was not totally and permanently disabled at any time while the insurance contract was in force and effect, but, on the contrary, shows that this man did work continuously for a period of two years, that he returned to his pre-war occupation immediately following discharge and continued for two years; that he made substantial earnings during that period of two years, and there is no medical evidence to establish tuberculosis in this case, and that is the one disability claimed.

With reference to the second cause of action, we move for a non-suit, in that there is nothing to show

(Testimony of Dr. Royal B. Tracy.)

that this man had compensation due him at the time of the lapse of the insurance, or that he was entitled to compensation at the date of death, or total and permanent disability, and these things must be shown in order to entitle the plaintiff to recover under section 305.

The COURT.—You may renew the motion after you get through with all the evidence.

Mr. BURNS.—Exception.

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DENNIS O'HEARN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

My name is Dennis O'Hearn. I worked for the Great Northern, as Chief Clerk in the Superintendent's office. As such I have custody of the payroll records of the Great Northern. Defendant's exhibit A are the original payrolls. Mr. Whitehead was paid in November, 1918, 48 hours, 64¢ an hour, \$30.70. In December, 1918, Mr. Whitehead worked 240 hours, for which he was paid [61] \$153.80. In January, 1919, Mr. Whitehead was paid \$148.50, working 232 hours. In February, 1919, he was paid \$102.40, working 160 hours.

A 31-day month has 248 hours—eight hours a day. February was a 28-day month.

(Testimony of Dennis O'Hearn.)

During March, 1919, he earned \$128.15, working 215 hours. During April, 1919, he was paid \$138.60, working 246 hours. During May, 1919, he was paid \$133.15, working 208 hours. In June, 1919, he was paid \$112.60, working 176 hours. During July, 1919, he was paid \$143.35, working 208 hours. He was paid the same rate as other men in the same capacity. During the month of August, 1919, he was paid \$97.30, working 152 hours. During September, 1919, he was paid \$133.90, working 26 days, or 208 hours, and 30 minutes overtime. During October, 1919, he was paid \$161.15, working 30 days, and one-half hour overtime. That was a full month. During November, he was paid \$157.55, working 30 days and one hour overtime. He was employed during November for thirteen days as night foreman. During December, 1919, he was paid \$150.65, working 28 days and several items of overtime, aggregating 225 minutes overtime. During January, 1920, he was paid \$145.20, working 28 days. During the month of February, 1920, he was paid \$117.50, working 23 days. During the first half of March, 1920, he worked ten days as a switchman, four days as a foreman, and earned \$72.75. The rest of the month of March is not in the records for some reason or other. He was paid \$84.10 for the rest of March, or 16 days, and 2 1-12 hours overtime. During the last half of March he worked one night as foreman. During April, 1920, he earned \$151.15, working 29 days. He was employed 9 days of that time as fore-



(Testimony of Dennis O'Hearn.)

man. During May, 1920, he was paid [62] \$119.10, working 23 days and 110 minutes overtime. During June, 1920, he was paid \$133.85, a total of 26 days, and one hour overtime. The second half of July does not seem to be in here—only the first half of July. He worked 10 days and earned \$51.35 during the first half of July. I cannot tell whether he was on vacation the last half of July. In August, 1920, he was paid \$188.55, working 29 days, with 30 minutes overtime. His salary was increased during August, 1920, the increase applying to everybody. He was paid \$149.00 in September, 1920, working 23 days. During October, 1920, he was paid \$156.85, working 24 days and 65 minutes overtime. During the month of November, 1920, he was paid \$114.10, working 16 days and 20 minutes. I have no record showing that he worked after November, 1920. Defendant's Exhibit A-1 is the original Personal Records file showing when he went to work and that he filled out a record.

#### Cross Examination by Mr. BETTS.

The record begins November, 1915, and was closed October 25, 1921. The record begins with the employee himself, the original record. It starts with the application for employment showing his service previous to entering the service of the Great Northern for a period of five years. If he is laid off for any reason or on vacation, or reduction of force, the form is made to that effect, as it is if he

(Testimony of Dennis O'Hearn.)

is promoted or commended. The superintendent on the division makes these records.

Mr. BURNS.—(Offering defendant's exhibit A-1, being personal history record of service of James W. Whitehead with the Great Northern Railway.) I wish to offer this as showing that an examination was given this man prior to [63] or on employment after his discharge, and in the employment as showing that the man was commended as a splendid worker throughout the period of employment, and as showing whether or not he suffered from ill health during this period. What his condition was during this time.

The COURT.—We are not concerned with him prior to his enlistment. This commenced in 1917.

Mr. BURNS.—Except that evidence was offered by the plaintiff to show that he was capable of carrying on prior to his enlistment and that his condition changed afterwards, and also indicated that he had not done his work properly. These records will show there was criticism of his work prior to his entry into service and that, on the contrary, after his discharge he was commended.

The COURT.—Denied. Exception noted.

Mr. BURNS.—I will offer this record as it pertains to this man from November, 1918, to 1921.

Mr. BETTS.—Objection, as incompetent, irrelevant and immaterial and because it was made up by persons unknown to plaintiff.

(Testimony of Carl A. Whitehead.)

The WITNESS.—The original record is made by the employee himself, which is the foundation of the file. I wasn't on the division at that time.

Mr. BETTS.—I object.

The COURT.—Sustained.

Mr. SHERWOOD.—The signature of Mr. Whitehead has been identified by the brother.

The WITNESS.—I do not personally know James W. Whitehead's signature.

The COURT.—Any statement that he signed would be admissible.

The COURT.—I do not know that the brother identified the signature.

Mr. SHERWOOD.—We had the brother identify it [64] as his signature.

The COURT.—Not that I know.

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CARL WHITEHEAD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

I would not want to say that is my brother's signature on Ex. A-3. It is different than the other two. The writing is different.

Mr. BETTS.—Objection as incompetent, immaterial, irrelevant and not identified.

The COURT.—Sustained.

DENNIS O'HEARN, recalled as a witness on behalf of the defendant, testified as follows on

Direct Examination by Mr. BURNS.

Those records are made up in the office. They are made up from time cards sent in from the yard. Those time cards would not show if the other men were helping him with the work.

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W. T. FLYNN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

I am a physician and surgeon and have been engaged as such since 1905. (Qualifications admitted by Mr. Betts.) I am employed by the Great Northern railroad. That is my signature on defendant's exhibit A-3. Whoever I examined signed it. I don't recall Mr. Whitehead. I do not know his signature. I examined the man of whom this paper is made up, and this is a report of my examination. [65]

Mr. Burns offers defendant's exhibit A-3, being the report of examination of Dr. Flynn dated March 31, 1919.

Mr. BETTS.—I object as incompetent, irrelevant and immaterial and Doctor has no recollection of examining the man.

Mr. BURNS.—It contains the doctor's signature and he stated it was signed in his presence.

(Testimony of W. T. Flynn.)

The COURT.—He has no recollection of the man, does not know that he signed it. If he has no personal recollection of what he found, and unless it can be definitely shown that that man signed it, and made the representations, and endorsed the certificates, I could not admit it.

Mr. SHERWOOD.—Hospital records are always admissible.

The COURT.—This is not a hospital report.

Mr. SHERWOOD.—Virtually the same.

Mr. SHERWOOD.—I would like an exception.

Mr. BURNS.—The defendant rests.

Mr. BURNS.—The Government moves for a dismissal of the complaint on the ground of total failure of proof tending to show a total disability of the deceased at the date of discharge, November, 1918. On the contrary, the evidence shows an ability to carry on continuously in a substantially gainful occupation over a period of approximately two years, during which he earned the same sums as employees engaged in the same occupation; and the burden being upon the plaintiff, there is a total failure of proof; and we also move for judgment on behalf of the United States, and move for a non-suit on the same grounds, and renew our motion made at the close of the plaintiff's case as to both causes of action. And a further matter: At the time the non-suit was granted, costs were assessed in the [66] sum, I believe, of \$67.90, which have not been paid. If any judgment is granted I would like to have that set off.

(Testimony of W. T. Flynn.)

Mr. BURNS.—I would like an exception to the denial of motions at this time.

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### DECISION OF THE COURT.

The COURT.—I think I can dispose of this as well now as at any time. The records and proofs show beyond any doubt that the deceased enlisted in the army July, 1918, and that he was discharged November 20, 1918; that he was committed to the insane asylum July, 1920, and that he died September 30, 1921.

The evidence shows that at the time the deceased was discharged it was recorded that he was suffering from a nervous disease. The particular affliction, if there was any particular affliction, is not noted in the discharge; and the evidence submitted, if believed, and there is no reason for the court to disbelieve it, from the witnesses who have testified, that upon arriving at home he was nervous; mumbling in his speech, could not hold a conversation, his conversation would roam,—pass from one subject to another; that he lost weight; that he tried to drive a truck in the employ of his brother; that he was unable to do the work for some reasons that were not fully disclosed in the evidence; that he was employed by the Great Northern Railway Company as switchman from November, 1918, until November, 1920, for a very large portion of the time, cov-

ering a period of twenty-five months. During that time he worked some three or four months—possibly [67] four, or five whole months, and the other months he worked a greater part of the month; he received the same wages that were paid to other employees in like work. In this employment he worked, with very few exceptions, with and under foremen who were personally friendly to him—one who had been a very intimate friend for fifteen years, or more, a roommate for a large portion of the time in the city of Seattle. The testimony is that while the now deceased was employed and was paid the regular compensation during that time, he was unreliable. He could not perform the duties that were entrusted to him; he could not remember cars; made mistakes in numbers of cars, and in places for switching cars. On one occasion he switched a number of cars out on the main line of the railway in endeavoring to carry out some other order. This foreman testified, and another foreman and a switchman, that they relieved him from the work and carried him along, because he belonged to the union, and never made any complaint to the officers of the company, because they did not want him to lose his position. One of the foremen testified that he did not have much recollection of the man except that he could not be relied upon and made mistakes. The evidence shows that while he was foreman of the switching gang, at one time nine days, and sometimes two or three days at a time, this was not because of merit, because under

the rules of the Union, a person is promoted according to the length of service—seniority of service will cause the promotion rather than proficiency in the work. The testimony of these witnesses is corroborated by the conduct of the deceased when he was off work,—the scrubbing of the bathroom some five or six times, as testified to by the mother; and likewise, his conduct in crying at the table at his [68] home and complaining of the splendidly prepared chicken by expressing disgust that he was served with the same old beef stew; and from the testimony I am convinced that the deceased could not, of his own ability, have held any position that would have given him a substantially gainful remuneration; and I have not any question in my mind that, but for the action of his co-workers in carrying him along in the fashion they did, and concealing his conduct on the job, he would not have been permitted to remain on the job. He was a dangerous man and ought not to have been there; and then that, following along with his commitment to the insane asylum where he died, and the testimony of the doctor—the medical testimony, which shows that he was suffering from a nervous, mental disease—paresis—there can be no doubt that he was totally and permanently disabled because of this condition from the date of his discharge. I don't think there is any other conclusion to arrive at, but that he was totally and permanently disabled, from the testimony shown here, from the date of his discharge.



As to the second cause of action: From what I have said, it isn't necessary to say anything upon the second cause of action, but I would like to make this observation as to the second cause of action. There isn't any testimony before the Court of any irregular conduct on the part of the deceased which would bring about the condition for which he was treated. I don't know just what the record shows—I have not examined it. If this condition was in his system at his enlistment, and if the Government position is true—but the presumption is that he was free from anything of this sort, and there is no evidence that he was, except [69] some statement that says that there was some scab on the end of his penis, but, being accepted, the Government is bound. He is presumed to be—to have been, all right. There is no evidence that he did anything to bring about any condition of syphilis; and if it was in his system, there was something to aggravate it—whether it was aggravated, the Court is unable to say, nor is it necessary; and as to his misconduct in service and in the absence of proof, the presumption would be that his conduct was good—the presumption would be in his favor.

I think a judgment must follow in favor of the plaintiff.

There should be a credit to the Government as to the costs assessed against him in the former case.

Mr. SHERWOOD.—I think they are sixty-seven dollars and some cents.

The COURT.—Whatever it is.

Mr. SHERWOOD.—The Government excepts to the Court's findings and judgment on the ground that there was failure of proof of total and permanent disability at the time of discharge; and also, excepts to the Court's decision and failure to grant the motion of the Government for judgment at the conclusion of all the evidence.

The COURT.—I will make this observation. You can prepare the further findings of fact. It will be that a disagreement was had. You can prepare the order.

Mr. BETTS.—Disagreement was stipulated.

Mr. BETTS.—The originally named beneficiary was joined as a party defendant, and she not having answered, I would like default against her.

The COURT.—Make the proclamation. You should have had that done. [70]

Mr. SHERWOOD.—Also, the Government excepts to the Court's denial of the motion for judgment on the second cause of action on the ground there is no proof of disagreement.

The COURT.—You can prepare these findings and present them right soon so the matter won't be suspended indefinitely.

(Default entered against the originally named beneficiary.) [71]

WHEREUPON, within the time limited by law and after the conclusion of the trial herein, defendant, in writing, requested the following proposed Findings of Fact and Conclusions of Law, which the Court refused to give:

## FINDINGS OF FACT.

## I.

That the plaintiff is the duly qualified and acting administratrix of the estate of James W. Whitehead, deceased, having been appointed as administratrix of said estate in Seattle, King County, Washington; that the plaintiff is now a resident of Seattle, Washington; that the plaintiff is the mother of the deceased, and at the time of his death, and prior thereto, was wholly dependent on him for support.

## II.

That James W. Whitehead enlisted for military service with the United States Army in the month of July, 1918, and was honorably discharged therefrom on the 20th day of November, 1918.

## III.

That immediately upon enlisting, desiring to be insured against the risks of war, the said James W. Whitehead applied for a policy of War Risk Insurance in the sum of \$10,000.00, designating no authorized person as beneficiary on said policy; that thereafter, there was deducted from his monthly pay as premium for said insurance the sum of \$6.60 per month, and a policy of insurance was duly issued to him, by the terms whereof, the defendant agreed to pay said James W. Whitehead the sum of \$57.50 per month in the event he suffered total and permanent disability, or in the event of his death to make 240 such payments to

his estate, and that the premiums were paid thereon to November, 1918, only. [72]

#### IV.

That said James W. Whitehead died of paresis, superinduced by constitutional lues (syphilis), on the 30th day of September, 1921.

#### V.

That said James W. Whitehead was at no time after discharge, until July 27, 1921, suffering from a compensable disability within the purview of the laws and regulations affecting the administration of veterans' affairs by the United States Veterans' Bureau.

#### VI.

That James W. Whitehead became totally and permanently disabled on July 27, 1921.

#### VII.

That the policy of insurance, aforesaid, issued to the said James W. Whitehead, lapsed for non-payment of premiums November 31, 1918, and was not in force and effect at the time said James W. Whitehead became totally and permanently disabled on July 27, 1921; that no premiums were paid by said insured, James W. Whitehead, nor by anyone on his behalf, subsequent to November 31, 1918, the date of lapsation of said insurance, or prior to the beginning of permanent and total disability of said insured, July 27, 1921.

## VIII.

That said James W. Whitehead was not totally and permanently disabled at the time of his discharge on November 20, 1918, but was able-bodied and worked continuously at a substantially gainful occupation, to-wit, as a switchman and switch foreman, from November, 1918, until November, 1920, earning during that period the same wages paid to men engaged in like employment, to-wit, wages [73] ranging from \$5.11 a day to \$6.40 a day; he, the said James W. Whitehead, working not less than thirteen days in each month during said twenty-five months, the period of his employment as a switchman and switch foreman; that said James W. Whitehead, during such period of employment, received several certificates of merit from his superiors for efficient work, and his salary was, from time to time, raised by his employers.

## IX.

That said James W. Whitehead was guilty of misconduct while in the service, prohibiting the granting to him by the United States Veterans' Bureau of a compensation disability rating for the purposes of compensation.

## X.

That a judgment for costs in the sum of \$67.90 in cause Number 12140 in the above entitled Court remains unsatisfied by plaintiff herein, and is a proper offset against any judgment obtained by plaintiff in this cause.

## CONCLUSIONS OF LAW.

## I.

That the plaintiff is entitled to recover on either cause of action herein.

## II.

That both of said causes of action herein should be dismissed and the defendant have judgment for its costs and disbursements herein.

WHEREUPON, after the Court refused to give and make the proposed Findings of Fact and Conclusions of Law, the defendant duly filed herein its Exceptions to the Court's refusal to make and enter such Findings of Fact and [74] Conclusions of Law, which Exceptions are as follows:

## I.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. I.

## II.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. II.

## III.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. III.

## IV.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. IV.

V.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. V.

VI.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. VI.

VII.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. VII.

VIII.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. VIII.

IX.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. IX.

X.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. X. [75]

XI.

Defendant excepts to the refusal of the Court to make and enter defendant's requested conclusion of law No. I.

XII.

Defendant excepts to the refusal of the Court to make and enter defendant's requested conclusion of law No. II.

WHEREUPON, the following Findings of Fact and Conclusions of Law submitted by the plaintiff were made and found by the Court:

I.

That the deceased, James W. Whitehead, enlisted for service in the United States Army in July, 1918, and was honorably discharged therefrom on the 20th day of November, on a surgeon's certificate of disability.

II.

That during the plaintiff's military service, he applied for and was granted a policy of war risk insurance of \$10,000.00, and premiums were paid thereon during his service in the United States Army.

III.

That the plaintiff is the duly appointed, qualified and acting administratrix of the estate of James W. Whitehead, deceased, in Seattle, King County, Washington.

IV.

That during the period of service of the deceased in the United States Army, he became afflicted with paresis by reason of said disease, he was discharged on the 20th day of November, 1918, totally and permanently disabled from following continuously any substantially gainful occupation, and as a result of which disease he died on the 30th day of September, 1921, in the State Insane Asylum, by reason [76] whereof he became entitled to receive from the de-



fendant the sum of \$57.50 per month commencing on the said 20th day of November, 1918.

V.

That on said date of discharge, to wit: November 20th, 1918, the policy of insurance herein sued upon was in full force and effect.

VI.

That a judgment for costs in the sum of \$67.90 in a cause number 12140 in the above entitled Court remains unsatisfied by the plaintiff herein and is a proper offset against plaintiff's judgment herein.

VII.

That the defendant, Lilly Gladys Whitehead, was duly and regularly served in this action by publication made in the manner provided by order of this Court made and entered on the 15th day of April, 1930.

VIII.

That the defendant, United States of America, has disagreed with the plaintiff as to her claim.

CONCLUSIONS OF LAW.

I.

That the Court has jurisdiction of the parties and of the subject matter of this action.

II.

That the plaintiff is entitled to recover from the defendant, United States of America, the sum of

\$57.50 per month commencing on the 20th day of November, 1918.

WHEREUPON, after the Court made and entered the Findings of Fact and Conclusions of Law submitted by [77] plaintiff, defendant duly filed herein its exceptions to the Court's making and entering of such Findings of Fact and Conclusions of Law, which exceptions are as follows:

### I.

Defendant excepts to Finding of Fact No. IV on the ground that there was no competent proof tending to show that deceased became afflicted with paresis during the period of service in the United States Army, and that there was no competent proof tending to show that deceased was totally and permanently disabled from following continuously any substantially gainful occupation at the time of discharge from the United States Army on November 20, 1918; and on the further ground that the uncontroverted evidence adduced at trial showed that said decedent was, for a period of two years immediately after discharge from the United States Army, able-bodied, and that he carried on continuously a substantially gainful occupation, to wit: that of switchman and switch foreman, earning the same wages and doing the same work as others engaged in like occupations at the same time.

### II.

Defendant excepts to Conclusion of Law No. II as made by the Court on the ground that there was

no evidence upon which to base such a conclusion of law; the evidence, on the contrary, showing that plaintiff is not entitled to recover from the defendant, United States of America, in the sum of \$57.50 per month, or any other sum whatsoever.

Exceptions hereinabove noted, allowed. [78]

And now, in furtherance of justice and that right and justice may be done the defendant, it prays that this, its bill of exceptions may be settled, allowed, signed, sealed by the Court and made a part of the record.

ANTHONY SAVAGE,

United States Attorney.

CAMERON SHERWOOD,

Assistant United States Attorney.

LESTER E. POPE,

Regional Attorney, United States  
Veterans' Bureau.

Received a copy of the within Proposed Bill of Exceptions this 11th day of March, 1931.

GRAHAM K. BETTS,

Attorney for Plaintiff. [79]

(Title of Court and Cause.)

### ORDER SETTLING BILL OF EXCEPTIONS.

The above case coming on for hearing on application of the defendant to settle the bill of exceptions in this cause, counsel for both parties appearing; and it appearing to the Court that said bill of exceptions contains all of the material facts occurring upon the trial of the cause and all the evidence adduced at the same together with exceptions thereto and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions; and the parties hereto having stipulated and agreed upon said bill; the Court being duly advised, it is by the Court

ORDERED that said bill of exceptions be, and it hereby is settled as a true bill of exceptions in said cause, which contains all of the material facts, matters, things and exceptions therefor, occurring upon the trial of said cause and evidence adduced at same and not of record heretofore, and the same is hereby certified accordingly by the undersigned Judge of this Court who pre- [80] sided at the trial of said cause, as a true, full and correct bill of exceptions, and the Clerk of the Court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED, that the Clerk of this Court attach all of the exhibits in this cause

to said bill of exceptions, making the same a part hereof.

DONE in open Court this 23rd day of March, 1931.

JEREMIAH NETERER,  
United States District Judge.

O. K.

GRAHAM K. BETTS,  
Attorney for Plaintiff.

CAMERON SHERWOOD,  
Asst. U. S. Atty.

[Endorsed]: Filed Mar. 23, 1931. [81]

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(Title of Court and Cause.)

PROPOSED ADDITIONAL ASSIGNMENT  
OF ERROR.

Comes now the United States of America, defendant herein, and by Anthony Savage, United States Attorney, Cameron Sherwood, Assistant United States Attorney for the Western District of Washington, and Lester E. Pope, Regional Attorney, United States Veterans' Bureau, makes the following proposed additional assignment of error herein:

I. That the Trial Court erred in entering judgment in favor of the plaintiff in violation of the provisions of Section 300 of the World War Veterans Act and United States Code Annotated, Title 38, Section 511, in that Lilly Gladys Whitehead was

the only beneficiary designated in the policy of insurance herein sued upon.

ANTHONY SAVAGE,

United States Attorney.

CAMERON SHERWOOD,

Assistant United States Attorney.

LESTER E. POPE,

Regional Attorney,

U. S. Veterans Bureau.

Copy received this 29th day of Mar. 1931.

GRAHAM K. BETTS,

Atty. for Plff.

[Endorsed]: Filed Mar. 30, 1931. [82]

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(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

On the application of the defendant herein it is hereby

ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore entered and filed herein on the 29th day of December, 1930, be, and the same is, hereby allowed.

It is further ORDERED that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

DONE in open Court this 9 day of March, 1931.

NETERER,

United States District Judge.

Received a copy of the within Order this 5th day of March, 1931.

GRAHAM K. BETTS,

Attorney for Plff.

[Endorsed]: Filed Mar. 9, 1931. [83]

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(Title of Court and Cause.)

STIPULATION.

It is hereby STIPULATED between the parties to the above entitled action, by and through their respective attorneys of record, that the defendant herein may have an extension of time to and including June 1, 1931, in which to file its record on appeal herein in the United States Circuit Court of Appeals for the Ninth Circuit; and

It is further STIPULATED that the present term of court may be deemed to be extended for that purpose.

DATED at Seattle, Washington, this 6.

ANTHONY SAVAGE,

United States Attorney.

CAMERON SHERWOOD,

Assistant United States Attorney.

GRAHAM K. BETTS,

Attorney for Plaintiff.

[Endorsed]: Filed April 6, 1931. [84]

(Title of Court and Cause.)

**ORDER**

Upon application of the complainant herein, and pursuant to stipulation of both parties, it is hereby

**ORDERED** in the above entitled action that the defendant may have an extension of time to and including June 1, 1931, in which to file its record on appeal herein in the United States Circuit Court of Appeals for the Ninth Circuit; and it is

**FURTHER ORDERED** that the present term of court may be deemed extended for that purpose.

**DONE** in open Court this 6 day of April, 1931.

**JEREMIAH NETERER,**  
United States District Judge.

Received a copy of the within Order this 6th day of April, 1931.

**GRAHAM BETTS,**  
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 6, 1931. [85]

(Title of Court and Cause.)

**PRAECIPE FOR TRANSCRIPT OF RECORD.**

To the Clerk of the above entitled Court:

You will please certify to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the documents listed below.

Amended Complaint.

Answer to Amended Complaint.



Reply.

Stipulation waiving jury trial.

Judgment.

Stipulation and Order extending time for lodging and settling proposed Bill of Exceptions to March 1, 1931.

Motion for New Trial.

Order Denying Motion for New Trial.

Findings of Fact and Conclusions of Law (Plaintiff).

Findings of Fact and Conclusions of Law (Defendant).

Exceptions of Defendant to Court's Failure to make and enter Findings of Fact and Conclusions of Law proposed by Defendant.

Exceptions to Findings of Fact and Conclusions of Law as made and entered by the Court.

Stipulation and Order allowing defendant to March 20th to lodge and settle Bill of Exceptions.

Notice of Appeal.

Petition for Appeal.

Assignments of Error.

Order Allowing Appeal.

Citation on Appeal.

Original exhibits both offered and omitted.

Copy of this Praeceptum.

ANTHONY SAVAGE,  
United States Attorney.  
CAMERON SHERWOOD,  
Assistant United States Attorney.

Received a copy of the within Praeceptum this 11 day of March, 1931.

GRAHAM K. BETTS,  
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 12, 1931. [86]

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(Title of Court and Cause.)

To the Clerk of the above-entitled Court:

You will please issue and include as part of transcript of record above cause to be certified to U. S. Circuit Court of Appeals additional Assignment of Errors heretofore filed herein, and a copy of this praecipe.

CAMERON SHERWOOD,  
Asst. United States Attorney.

Received a copy of the within Praeceptum this 1st day of April, 1931.

GRAHAM K. BETTS,  
Attorney for Plaintiff.

[Endorsed]: Filed April 1, 1931. [87]

(Title of Court and Cause.)

ADDITIONAL PRAECIPE FOR TRANSCRIPT  
OF RECORD.

To the Clerk of the above entitled Court:

You will please certify to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the documents listed below.

Minute entry showing default of additional party defendant.

Petition for joinder of additional party defendant.

Order joining additional party defendant.

Affidavit of publication of summons on additional party defendant.

Copy of this Praecipe.

Stipulation and order extending time and term for lodging record on appeal.

ANTHONY SAVAGE,  
United States Attorney,  
CAMERON SHERWOOD,  
Asst. United States Attorney.

Received a copy of the within Praecipe this 6th day of April, 1931.

GRAHAM K. BETTS,  
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 6, 1931. [88]

(Title of Court and Cause.)

PRAECIPE.

To the Clerk of the above-entitled Court:

You will please issue supplemental transcript of record as follows:

(1) Minute entry of motion for default against the defendant Lilly Gladys Whitehead.

(2) Minute entry of Order of default against the defendant Lilly Gladys Whitehead.

(3) This praecipe.

GRAHAM K. BETTS,  
Atty. for Plaintiff.

[Endorsed]: Filed May 5, 1931. [89]

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(Title of Court and Cause.)

PRAECIPE

To the Clerk of the above-entitled Court:

You will please issue supplemental transcript and certify to the Circuit Court the following:

(1) Motion and affidavit for publication of summons against defendant Lilly Gladys Whitehead.

(2) Order for Summons by publication against defendant Lilly Gladys Whitehead.

GRAHAM K. BETTS,  
Atty. for Plaintiff.

[Endorsed]: Filed May 19, 1931. [90]

(Title of Court and Cause.)

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD  
ON APPEAL.

United States of America,  
Western District of Washington—ss.

I, Ed. M. Lakin, Clerk of the above entitled court do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 90, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause except Reply to Answer to Amended Complaint which has been lost and no copy thereof substituted in the record, and (except captions etc. where omitted) as is required by praecipes of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above cause, to wit:

Clerk's fees (Act Feb. 11, 1925) for making certificate, record or return 266 folios, at 15c.....	\$39.90
Appeal fee, (Section 5 of Act).....	5.00
Certificate of Clerk to Transcript of Record,.....	.50
Certificate of Clerk to Original Exhibits.....	.50
	<hr/>
Total,.....	\$45.90

[91]

I hereby certify that the above cost for preparing and certifying record, amounting to \$45.90, has not been paid to me for the reason that the appeal herein is being prosecuted by the United States of America.

I further certify that I hereto attach and herewith transmit the original citation issued in the cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, this 26 day of May, 1931.

[Seal]

ED. M. LAKIN,

Clerk of the United States District Court,  
Western District of Washington.

By E. W. PETTIT,

Deputy [92]

(Title of Court and Cause.)

CITATION ON APPEAL

United States of America,  
Western District of Washington—ss.  
Northern Division.

The President of the United States to JESSIE SMITH, Administratrix of the Estate of JAMES W. WHITEHEAD, Deceased, plaintiff, and GRAHAM K. BETTS, her attorney:

YOU, and EACH OF YOU, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals to be held at the City of San Francisco, California, in the Ninth Judicial Circuit, on the 10th day of April, 1931, pursuant to an order allowing appeal filed in the office of the Clerk of the above entitled Court, appealing from the final judgment signed and filed on the 29th day of December, 1930, wherein the United States of America is defendant, and Jessie Smith, Administratrix of the Estate of James W. Whitehead, is plaintiff, to show cause, if any there be, why the judgment rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESSETH the Honorable Jeremiah Neterer, United States District Judge for the Western District of Washington, Northern Division, this 9 day of March, 1931.

[Seal]

JEREMIAH NETERER,  
United States District Judge.

[Endorsed]: Filed Mar. 9, 1931. [93]

Received a copy of the within Citation on Appeal this 5 day of March, 1931.

GRAHAM K. BETTS,  
Attorney for Plaintiff. [94]

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[Endorsed]: No. 6484. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Jessie Smith, Administratrix of the Estate of James W. Whitehead, Deceased, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed June 1, 1931.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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(Title of Court and Cause.)

STIPULATION CONCERNING PARTS OF  
RECORD TO BE PRINTED.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that the appeal herein is based upon the assignment of error marked as Defendant's Proposed Additional Assignment of Error, contained in the original record at page 82 thereof, and that for the purpose of this appeal only the following parts of the record shall be printed:

1. Amended Complaint, record page 1.



2. Answer to Amended Complaint, page 5.
3. Petition for joinder of additional party defendant, page 9.
4. Order granting petition for joinder of additional party defendant, page 11.
5. Motion and Affidavit for an order of publication of summons against defendant Lilly Gladys Whitehead, page 12.
6. Order for publication of summons, page 14.
7. Publisher's affidavit of publication of summons, page 15.
8. Order of Default against defendant Lilly Gladys Whitehead, page 18.
9. Assignments of Error, page 41.
10. Defendant's proposed additional Assignment of Error, page 82.
11. Findings of Fact and Conclusions of Law, page 26.
12. Exceptions to Findings of Fact and Conclusions of Law, page 19. [95]
13. Defendant's proposed Findings of Fact and Conclusions of Law, page 19.
14. Exceptions to refusal of defendant's proposed Findings of Fact and Conclusions of Law, page 24.
15. Judgment, page 31.
16. Motion for New Trial, page 33.
17. Order Denying Motion for New Trial, page 34.
18. Notice of Appeal, page 39.
19. Petition for Appeal, page 40.
20. Order Allowing Appeal, page 83.

21. Citation on Appeal, page 93.
22. Stipulation for extending time for filing record in the U. S. District Court of Appeals, page 84.
23. Order extending time for filing record in the U. S. District Court of Appeals, page 85.
24. Stipulation for extending time to file and lodge Bill of Exceptions, page 35.
25. Order extending time to file and lodge Bill of Exceptions, page 36.
26. Stipulation for extending time to file and lodge Bill of Exceptions, page 37.
27. Order extending time to file and lodge Bill of Exceptions, page 38.
28. Stipulation waiving jury trial, page 17.
29. Order Settling proposed Bill of Exceptions, page 80.
30. All praecipis, pages 86-90 inclusive.
31. Bill of Exceptions as follows: commencing line 28, page 24, Bill of Exceptions, to and including all of page 25; all of said matter being contained in record pages 70 and 71.
32. Certificate of Clerk to transcript of record, page 91.

Signed at Seattle, Washington, this 1st day of June, 1931.

ANTHONY SAVAGE,  
(U. S. District Attorney)

CAMERON SHERWOOD,  
(Asst. U. S. District Attorney)  
Attorneys for Appellant.

GRAHAM K. BETTS,  
Attorney for Appellee. [96]